



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 10, 2003

Ms. Marigny A. Lanier
Maris & Lanier
1450 Meadow Park, LB 702
10440 N Central Expressway
Dallas, Texas 75231

OR2003-3965

Dear Ms. Lanier:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182566.

The City of Waxahachie (the "city"), which you represent, received a request for the following information:

- (1) *Affidavit In Any Fact* and/or any information gathered on [a named individual].
- (2) Employment File
- (3) Grievance file and any and all documents relating to [the named individual's] employment through termination.
- (4) Complaint filed against [the named individual] by [a named individual] against [the named individual].
- (5) Employee Handbook in effect in December of 2002.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.108¹ of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. You state, and provide documentation showing, that the city

¹As the city did not submit written comments to this office stating the reasons why section 552.108 of the Government Code would allow the requested information, or portions thereof, to be withheld from disclosure, we find the city has waived this exception. See Gov't Code §§ 552.301, .302.

received the present request for information on March 21, 2003. The city did not request a decision from this office until April 7, 2003. Consequently, the city failed to comply with the requirements of section 552.301(b) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.-Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling interest exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Sections 552.103 and 552.107 are discretionary exceptions under the Public Information Act and do not demonstrate compelling reasons to withhold information from the public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the submitted information may not be withheld under section 552.103 or 552.107. However, as section 552.101 of the Government Code provides a compelling reason to overcome the presumption of openness, we will consider your arguments under that exception.

Next, we note that some of the submitted documents are expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Some of documents in exhibit B-2 consist of completed evaluations, which are expressly public under section 552.022(a)(1). You do not claim that the submitted information is excepted under section 552.108. Therefore, you may only withhold the submitted evaluations if they are confidential under other law. Although you argue that the submitted information is excepted under sections 552.103 and 552.107 of the Government Code, as noted above, these sections are discretionary exceptions and, therefore, not "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4

S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect a governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the evaluations under section 552.103 or 552.107.

However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). This office has determined that when the attorney-client privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Evidence 503. Open Records Decision No. 676 at 5-6 (2002). We will therefore consider whether the submitted evaluations are excepted under Rule 503.

Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication

transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). See *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.--Houston [14th Dist.] 1993, no writ); see also Open Records Decision No. 676. We point out, however, that the submitted evaluations do not constitute communications made in furtherance of the rendition of professional legal services to the client for purposes of rule 503. See Open Records Decision No. 676 at 7-8 (2002) (privilege applies only to information that is communicated between privileged parties and government body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made). The evaluations, therefore, may not be withheld under Texas Rule of Evidence 503 and must be released to the requestor.

You claim that the document included in exhibit B-4 is excepted from disclosure under section 552.101 in conjunction with common-law privacy. Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses common-law privacy. The doctrine of common-law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common-law privacy, but because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No. 393 (1983) at 2; see Open Records Decision No. 339 (1982); see also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have a legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). In this instance, the requestor knows the identity of the victim. As we have consistently held, we believe that withholding only identifying information from the requestor where the requestor knows the victim's identity would not preserve the victim's common-law right to privacy. Therefore, we conclude that the city must withhold the document labeled as exhibit B-4 in its entirety. The city must also withhold portions of exhibits B-5 and B-6, which we have marked, under common-law privacy.

As noted above, the doctrine of common law privacy protects information that contains highly intimate or embarrassing facts about a person's private affairs such that its release would be highly objectionable to a reasonable person and the information must be of no

legitimate concern to the public. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Accordingly, we conclude that the city must withhold the photograph, name, and address of the complainant at issue in exhibits B-5 and B-6 under section 552.101 in conjunction with common-law privacy, as there is no legitimate public interest in this information.

Although you raise no other arguments for the remaining information, certain information within the remaining submitted materials is confidential and must be withheld from public disclosure.² Prior decisions of this office have held that section 6103(a) of title 26 of the United States Code renders tax return information confidential. See Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Tax return information is defined as data furnished to or collected by the IRS with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax. See 26 U.S.C. § 6103(b). The submitted W-4 forms are tax return information. The return of any taxpayer may be disclosed to any person that the taxpayer designates. See 26 U.S.C. § 6103(c). Therefore, the city must withhold the W-4 form and release it only as authorized under section 6103(c).

We note that the submitted information includes an Employment Eligibility Verification, Form I-9. Form I-9 is governed by title 8, section 1324a of the United States Code, which provides that the form “may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. 8 U.S.C. § 1324a(b)(5); see 8 C.F.R. § 274a.2(b)(4). Release of this document under the Public Information Act would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system.

We also note that the submitted information contains an e-mail address obtained from the public. Section 552.137 of the Government Code makes certain e-mail addresses confidential. Section 552.137 provides:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

²The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Gov't Code §552.137. You do not inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. The city must, therefore, withhold the e-mail address we have marked under section 552.137.

We further note that criminal history report information ("CHRI") is confidential and not subject to disclosure. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). Therefore, assuming that you have CHRI in your possession, you must withhold the CHRI from the requestor. We note, however, that the requestor's client can obtain her own CHRI from DPS. Gov't Code § 411.083(b)(3).

Finally, we note that the submitted documents contain credit card account numbers, checking account numbers, and telephone account numbers that are subject to section 552.136 of the Government Code. Section 552.136 makes certain access device numbers confidential and provides in pertinent part:

- (a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
 - (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

- (b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We have marked the access device numbers that must be withheld under section 552.136. In this case, however, some of the submitted information contains the requestor's client's account numbers. She has a special right of access to this information

because section 552.136 was enacted to protect a person's privacy. Therefore, the city must release the requestor's client's access device numbers pursuant to section 552.023(a) of the Government Code. Gov't Code § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interests).

To summarize, we conclude that (1) the city must withhold the document labeled as exhibit B-4, as well as the marked portions of exhibits B-5 and B-6, under section 552.101 in conjunction with common-law privacy, (2) the city must withhold the complainant's name, photograph, and address from the entirety of exhibits B-5 and B-6, (3) the city must withhold the submitted W-4 form and may release this form only as authorized by section 6103(c) of title 26 of the United States Code, (4) the submitted Form I-9 is confidential under section 552.101 and may only be released in compliance with the federal laws and regulations governing the employment verification system, (5) the city must withhold the e-mail address, which we have marked, under section 552.137, (6) assuming you have CHRI in your possession, you must withhold the CHRI from the requestor, and (7) certain access device numbers, which we have marked, must be withheld under section 552.136. The remaining submitted information must be released to the requestor.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

³We note that much of the information that you must release contains or consists of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, as noted above, the requestor in this instance has a special right of access to some of the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the city receives a future request for this information from an individual other than the requestor or the requestor's client, the city should again seek our decision.

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Sarah I. Swanson
Assistant Attorney General
Open Records Division

SIS/lmt

Ref: ID# 182566

Enc. Submitted documents

c: Ms. Diane K. Shaw
c/o Marigny Lanier
Maris & Lanier
1450 Meadow Park, LB 702
Dallas, Texas 75231
(w/o enclosures)